140-70

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 293.

THE UNITED STATES, APPELLANT,

vs.

SAMUEL A. BULLARD AND THE BULLARD CATTLE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED NOVEMBER 7, 1887.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 293.

THE UNITED STATES, APPELLANT,

vs.

SAMUEL A. BULLARD AND THE BULLARD CATTLE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print.
Transcript from district court	1	1
Exhibit A—Bill of complaint	1	1
Exhibit B—Answer	7	4
Exhibit C—Replication	9	5
Exhibit D—Deposition of Samuel A. Bullard	10	6
Affidavit of R. M. Morton	17	10
Affidavit of Levi Wilkinson	18	10
Affidavit of W. R. Hopkins	19	11
Affidavit of H. P. Myton	20	11
Affidavit of John Simon	21	12
Report of Wm. S. Drew, September 29, 1885	23	13
Affidavit of R. Rounds	25	14
Affidavit of A. Bennett	26	15
Proclamation of the President, August 7, 1885	27	15
Exhibit E—Opinion	29	17
Decree and appeal to circuit court	31	18
Decree and appeal to Supreme Court U. S	32	18
Clerk's certificate	33	19

1 EXHIBIT A.

In the district court of the United States for the district of Kansas. In equity.

To the judge of said district court:

The United States of America brings this, its bill of complaint, against Samuel A. Bullard and the Bullard Cattle Company, a corporation duly organized under the laws of Maine, and, thereupon, your orator complains, and says:

1. That the complainant is the owner of all the public lands in the district of Kansas. That among such public lands in said district are the following, to wit: A large portion of townships twenty-five (25), twenty-six (26), and twenty-seven (27) south of range thirty-one (31), west of the sixth principal meridian; and a large portion of townships twenty-four (24), twenty-five (25), twenty-six (26), and twenty-seven (27), range thirty-two (32) west of the sixth principal meridian, in Finney County, Kansas.

2. That the Congress of the United States duly passed, and on February 25, 1885, the President of the United States duly approved, an act or law declaring all inclosures of public lands unlawful, and prohibiting the maintenance of such enclosures.

3. And your orator further avers that the said Samuel A. Bullard and the Bullard Cattle Company, on or about the 29th day of September, 1885, without any claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States, proceeded to, and did make, erect, and construct, or caused and procured to be made, erected and constructed a certain fence, composed of posts and barbed wire, as follows:

2 Commencing at a point where the south shore of the Arkansas River and the west line of range thirty-two (32) west, intersect; thence running south along said range line to the south-west corner of section nineteen (19) (19), township twenty-four (24), south of range thirty-two (32), west; thence running east along the south line of said section nineteen to the south-east corner thereof; thence running south, on or near the section lines about seven mile to a point at or near the south-west corner of section twenty-nine (29) township twenty-five (25), south of range thirty-two (32), west; running thence in a southwesterly direction to a point at the north-west corner of township twenty-six (26), south of range thirty-two (32), west; running thence south along the west line of said township twenty-six to the north-west corner of section seven (7) in said last mentioned township and range thence in a south-easterly direction to a point about forty rods west of the north-east corner of the north-west quarter of section eighteen (18), township twenty-six (26), south of range (32), west; thence due south about six and one-eighth miles to the center of the north-east quarter of the north-west quarter of section eighteen (18), township twenty-seven (27) south of range thirty-two (32), west; thence due east about eleven miles to about the north-east quarter of the north-west quarter of section thirteen (13), township twenty-seven (27) south of range thirty-one (31) west. At the last mentioned point the said fence at

the date last aforesaid, to wit, the 29th day of September. 1886, connected with a similar fence the course of which said last mentioned fence is generally described as follows:

Commencing at or about the north-east quarter of the north-west quarter of section thirteen (13), township twenty seven (27), south of range thirty-one (31) west, and running thence in a general northerly direction to where
3 the east line of township twenty-five (25), south range thirty-one (31), west intersects the south bank of the Arkansas River. The last mentioned fence was built and constructed by parties other than the said Samuel A. Bullard & the Bullard Cattle Co. But by agreement with the builders thereof, the said Samuel A. Bullard and the Bullard Cattle Company connected the fence so as aforesaid built by them with the fence last described, so as to make the two fences a continuation of each other. Said fences enclose about 100,000 acres of land, of which about 58,000 acres is public land, all of which is enclosed by the said fences. And since the making, erection, and construction of the fence aforesaid, on or about the date aforesaid, by said Samuel A. Bullard and the said Bullard Cattle Company he, the said Samuel A. Bullard and the said Bullard Cattle Company, have each continuously maintained and controlled such fence. And the said fence, during all such time, has inclosed the public lands aforesaid, and the said Samuel A. Bullard and the said Bullard Cattle Company have each asserted a right to the use and occupancy of the public lands above described, without claim, color of title, or asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States.

4. That the said Samuel A. Bullard & the Bullard Cattle Company pany at and during all the dates specified in paragraph three of this bill of complaint, by means of the unlawful fencing inclosure and assertion described in said paragraph, have prevented and obstructed various citizens of the United States, whose names are unknown to your orator, from entering upon and establishing a residence on portions of the public lands above described, said lands, at and during all such times, being subject to settlement or entry under the public land laws of the United States.
4 And said Samuel A. Bullard, & the said Bullard Cattle Company by means of said unlawful fencing, inclosure, and assertion, during all such time have each prevented and obstructed free passage and transit over and through the public lands above described.

5. And your orator further avers that on the seventh day of August, 1885, the President of the United States issued his proclamation ordering and directing all and every unlawful inclosure of public lands to be immediately removed, and forbidding all persons from preventing or obstructing by means of such inclosures, any person entitled thereto from peaceably entering upon and establishing a settlement or residence on any part of the public land subject to entry and settlement under the laws of the United States.

And that the said Samuel A. Bullard & the said Bullard Cattle Company yet continue to maintain and control the fence and inclosure hereinbefore described; and yet refuse to remove the same or any part thereof; and yet continue to assert a right to the use and occupancy of the public lands so inclosed by him unlawfully as aforesaid and yet continue to prevent and obstruct persons from peaceably entering upon or establishing

a settlement or residence upon portions of the public lands aforesaid and yet continue to prevent and obstruct free passage or transit over or through said public lands. And that they threaten to continue in the commission of, all and singular, the unlawful acts as aforesaid.

Wherefore, your orator prays;

That the defendants be provisionally and perpetually enjoined and restrained from making, erecting or constructing any unlawful inclosure or fence upon or over any of the public lands within this district, and specially those portions thereof herein described; and from maintaining or controlling the fence and inclosure herein described; and from asserting a right to the exclusive occupancy of the public lands aforesaid, or any public lands, unless by virtue of a claim, color of title, or assertion of right thereto by or under claim, made in good faith with a view to the entry thereof at the proper land office under the general laws of the United States; and from preventing or obstructing any person or persons from peaceably entering upon and establishing a residence on any portion of the public lands hereinbefore described and subject to settlement or entry under the public land laws of the United States; and from preventing or obstructing free passage or transit over and through the public lands hereinbefore described, and that a final decree be awarded your orator ordering the removal of such unlawful fence and inclosure within five days thereafter, and unless the defendants remove such fence and inclosure within such time, for the destruction thereof in a summary way, and that the complainant may have such other further, or different belief therein, with its costs as the nature of the case may require.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, according to their best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each and all the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto severally, may it please your honors to grant to your orator a writ of subpœna ad respondendum, issuing out of and under the seal of this honorable court, to be directed to the said defendants, commanding each of them on a certain day, and under a certain penalty to be therein inserted, to appear before your honor in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further, to stand to, perform, and abide by such further order or decree as to your honors shall seem meet; and also a writ of provisional and a writ of perpetual injunction to the same tenor, purport, and effect as is hereinbefore set forth and prayed.

And your orator will ever pray, etc.

THE UNITED STATES OF AMERICA,
By W. C. PERRY,
U. S. Atty., & Solicitor for Complainant.

UNITED STATES OF AMERICA, *District of Kansas, ss.:*

On this 5 day of January, 1885, before me personally appeared William Y. Drew, to me well known as such, and who, being duly sworn, did depose

and say that he was and is a special agent of the land office of the United States; that he has read the foregoing bill of complaint, and knows its contents, and that the matters and things therein contained are true of his own knowledge, except as to such matters as are stated on information and belief, and that as to those matters he believes them to be true.

WM. Y. DREW.

Subscribed and sworn to before me this 5th day of January, 1885.

J. C. WILSON,
Clerk U. S. Dist. Ct., Dist. of Kansas. [SEAL.]

(Endorsed:) No. 611. In the district court of the United States, district of Kansas. United States of America vs. Stephen A. Bullard. Bill of complaint. In equity. Filed Apl. 21, 1886. J. C. Wilson, clerk; W. C. Perry, U. S. atty.

A true copy.

Attest:

J. C. WILSON, *Clerk.* [SEAL.]

7 EXHIBIT B.

In the district court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA
vs.
SAMUEL A. BULLARD AND THE BULLARD CATTLE Company, a corporation duly incorporated under the laws of the State of Maine.

1. The answer of Samuel A. Bullard and the Bullard Cattle Co., defendants, to the bill of complaint filed herein of the above named plaintiff. In answer to the said bill, I, Samuel A. Bullard, on his own behalf and the Bullard Cattle Co., say as follows: That the land described in said complaint as being within the enclosure therein described, a large proportion of which, to wit, about forth thousand acres, is the property of the Bullard Cattle Company, duly incorporated under the laws of the State of Maine, of which company the defendant herein is one of the managers; that said land is composed of alternate sections of land granted to the Atchison, Topeka & Santa Fé Railway Company by the plaintiff, and purchased by said company.

2. That the fence complained of in plaintiff's bill is the property of said company, with the exception of that portion thereof that lies upon the east sideof said land, which belongs to Barton Brothers, and has been removed within thirty days last past.

3. That the fence complained of in the plaintiff's bill did not make a perfect enclosure; that the Arkansas River on the north, a distance of about twelve miles, is no barrier to the crossing and recrossing of range cattle or people; that numerous roads cross the lands in question; that a bridge constructed across said river has its south landing upon the
8 lands described in plaintiff's bill and three roads diverge therefrom and pass through and over the lands described in plaintiff's bill.

4. That the fence complained of and described in plaintiff's bill, or that portion of it that belongs to said company with the exception of about two miles, is constructed upon the lands of said company and upon

leased lands held by said company, as defendant will be more fully able to show this honorable court by maps and surveys.

5. Defendant further says that said company nor himself, nor any one for said company or for himself has ever in any manner, shape or form prevented, or attempted to prevent, the ingress and egress of any citizen of the United States, or party entitled to locate upon any of the public domain that is situated within the limits of said fence for the purpose of entering either by timber culture entry, homestead, or pre-emption the public lands of the United States.

6. Defendant denies that he in any manner attempted or is enclosing the lands the Government of the United States, except as it might be so far as it became nesessary to construct fences around and across his own lands and leased lands that it might have made it an inclosure around some pieces of land of the complainant. Defendant says that having thus fully answered the bill of complaint filed herein, he prays the honorable court for his discharge with judgment for costs herein.

S. A. BULLARD,
By J. R. HALLOWELL,
His Attorney.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

On this 19th day of April, 1886, before me personally appeared S. A. Bullard, to me well known as such, and being duly sworn did depose and say that he was and is the defendant named in said bill; that he has read the foregoing answer and knows its contents and that the matters and things therein contained are true except as to such questions as may be stated on information and belief, and that as to those matters he believes them to be true.

9

SAMUEL A. BULLARD.

Subscribed and sworn to before me this 19th day of April, A. D. 1886.

J. C. WILSON,
Clerk. [SEAL.]

(Endorsed:) No. 611. United States of America vs. Samuel A. Bullard. Answer. Filed April 21, 1886. J. C. Wilson, clerk. Attorney for defendant.

A true copy.
Attest:
[SEAL.]

J. C. WILSON,
Clerk.

EXHIBIT C.

In the district court of the United States in and for the district of Kansas.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
SAMUEL A. BULLARD AND THE BULLARD Cattle Company, defendants.

The replication of the plaintiff to the answer of the defendant. This repliant, saving and reserving to itself all and all manner of advantage of

exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto saith, that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law, to be answered unto by the said defendants; and that the answer of said defendants is very
10 uncertain, evasive, and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained materially or effectually in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, avoided, traversed, or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill it hath already prayed.

W. C. PERRY,
U. S. Attorney, Attorney for Plaintiff.

(Endorsed:) No. 611. United States vs. Samuel A. Bullard et al. Replication. Filed April 21st, 1886. J. C. Wilson, clerk.
A true copy.
Attest:
[SEAL.] J. C. WILSON,
Clerk.

EXHIBIT D.

In the district court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
SAMUEL A. BULLARD AND THE BULLARD CATTLE COMPANY, DEFENDANTS.

Deposition of Samuel A. Bullard, taken by agreement without notice, to be used in the trial of said action by either or both parties.

Examination-in-chief:

SAMUEL A. BULLARD, being duly sworn, upon oath says: I am one of the members of the Bullard Cattle Company and a defendant in this action. I have been one of the managers of said company from its incorporation, and have had charge of the land of said company, located within the so-called enclosure as described in the bill of complaint. I have at all times encouraged settlers to locate upon the public lands within the
11 so-called enclosure, and have myself and said company have maintained gates upon the lands of the defendant company for ingress and egress, and said company has sunk several wells at great expense upon its lands within said enclosure, and has procured water, which settlers have been permitted to use; that I never intended, nor did the Bullard Cattle Company intend to enclose public lands for the purposes mentioned in complainant's bill. There are eight gates through defendant's fence, and a large number of roads running across said lands; that the timber-culture entries leased are bona fide.

Cross-examination:

Question. Mr. Bullard, when was the fence described in the bill of complaint constructed; that is, the fence of the Bullard Cattle Company?

Answer. We commenced building it in the fall of 1884; we built about nineteen miles that fall. This nineteen miles commenced at where we joined Barton's fence, running west about eleven miles; thence north about three miles; thence northwest about five miles, and did not connect with the river. In 1885, we bought the railroad's land and then moved this fence in a direct line north and continued it on into the river and completed it that fall. We found when we surveyed these claims in the spring of 1885, that the fence was, in some places, not on the claims, and in the summer of 1885, we had it moved onto the timber-culture claims.

Q. When were these timber claims taken?

A. The first ones were taken in 1884, in the summer of 1884; and were taken then from time to time until the latter part of that winter, the following winter.

Q. Were these timber-culture claims taken after a conference between you and the individuals who took them?

A. Yes, sir.

12 Q. Were they taken with the understanding as to the manner in which they would be located?

A. They were taken in this way: At that time the timber-culture law was about to be repealed and everybody in that country was anxious to use their right, and I told my friends that if they would locate their claims where they would do us some good we would bear the expense of the work and we would have the use of them until they proved up on them, but in each and every case there was a distinct understanding that the claim belonged to the party that took it, and we were to have nothing but the use of it.

Question. Before these claims were located you understood they would be located as they subsequently were, and it was understood that you would have the right to construct your fence on the claims?

A. We were to have the use of them. At that time this law under which this action was brought had not been passed, and our motive in wanting it done was that we should not be disturbed by settlers taking claims and exacting a royalty from us. The fence that we constructed after this law was passed, excepting to move the old fence, was on this railroad land that we had bought.

Q. What was the object of the Bullard Cattle Company in purchasing this railroad land?

A. As a range for their cattle. We occupied it for three years previous to our purchasing it.

Q. What was the object of the Bullard Cattle Company and your object as one of its managers of said fence in constructing this fence.

A. To keep the cattle from drifting south. As the fence we first built *built* was simply a drift fence, and then when we bought the railroad land we thought we had a right to run it into the river.

13 Q. The object of the construction of the fence was to confine the cattle of the company on three sides of the pasture?

A. Yes, sir; they never drifted north in the winter time; this was simply a winter protection.

Q. The business of the Bullard Cattle Company is simply to deal, trade, and purchase cattle and sell and raise cattle?

A. Yes, sir; that is the business of the company.

Q. In the operation of the business of the company, the fence that was built and owned by the company, in connection with the fence on the east side, owned by Barton Brothers, rendered it unnecessary to employ any one to keep the cattle of the company on the east, on the south, and on the west?

A. Yes, sir; except so far as we had to employ men to watch the fence.

Q. On the north the pasture is bounded by the Arkansas River?

A. Yes, sir.

Q. That is a stream the banks of which are meandered, is it not?

A. Yes, sir.

Q. How many miles of this fence are there altogether?

A. There is about twenty-eight.

Q. Where are these eight gates that you speak of in your testimony in chief?

A. There are three in the northwest corner of the pasture, one on the west side, opposite section seven, and four on the south line of the fence.

Q. The four gates on the south, about how are they distributed; that is, how far are they apart?

A. They are distributed irregularly. There is one at each south corner and one about four miles east of the southwest corner and the other about two miles east of that. We notified the settlers, when they commenced settling south of the pasture, that whenever they would agree
14 among themselves that they wanted a gate we would put one in, and some of these gates were put in at their request.

Q. These wells that you speak of are all sunk on the land of the Bullard Cattle Company?

A. Yes, sir; with the exception of one, and that is on my individual homestead claim which is in the pasture.

Q. The primary object in sinking the wells was, of course, to supply your cattle with watering places?

A. Yes, sir.

Q. The construction of this fence was undertaken and completed by your company simply with the idea of facilitating it in the exercising of its business as a matter of course?

A. Yes, sir; just as a matter of economy to save expense.

Q. And the fact that public lands were inside the inclosure, as it is termed in the bill, did not enter into your calculations?

A. No, sir; not all. We thought when we built the fence that it was not an inclosure.

Q. But as a matter of fact you knew that public lands were within the so-called enclosure?

A. Yes, sir; we knew that public lands were in the pasture.

Re-direct examination:

Q. Mr. Bullard, you may make any other statement that may occur to you in regard to the lands in question, or the matters in this suit, that you have not been asked about that you may may desire at this time.

A. The two miles of fence that are on Government lands, when we were arranging with these parties to lease their lands of them and they

were taking them there, we didn't care to have any of them taken at that place, because we thought the land was too poor ever to be taken. It is sand-hills there, but some of the claims have since been taken.

15 Q. Since the map that is in evidence was made, which was prepared some time in January last, has there been any additional claims taken inside of the fence?

A. I know that only by hearsay. Land agents at Garden City have told me that large numbers have located there since then.

Re-cross-examination:

Q. You are still using the so-called enclosure as a pasture?

A. The fence still stands there, excepting that part owned by Barton Bros. But our cattle drifted and broke it; we are not getting any benefit out of it, and Barton's fence being down, it is all open on the east.

Q. You spoke in your direct examination of roads; your language is: "A large number of roads run across said lands." Do you mean by that that public roads have been opened, or are they simply roads by prescription or use?

A. So far as I know, with the exception of two, they are simply roads by use. Two of the roads entering the pasture at its northeast corner have recently been laid out by the county commissioners of Finney County, which is an organized county, and established as roads.

Q. Some of the witnesses here have testified that this Arkansas River is fordable at almost any point between the east and west lines of this fence; is that a fact?

A. My remembrance is that it is nearly always fordable. I have had cattle on the south of the pasture for three years, and until recently could get to them only by fording the river, which I did at all times. Sometimes I would swim my horse, but it would be only a few days at a time that the river was that high.

Q. When you speak and the other witnesses speak of the river
16 being fordable, you mean by a person on horseback, I suppose?

A. Yes, sir; on horseback always, and almost always by wagons.

Q. Is there no quicksand; or is that a part of the river where quicksand does not abound?

A. There are quicksands in places, but there are several principal places where they ford that have been selected because there is little quicksand.

Q. How many miles of river is included between the east and west lines of the fence?

A. Taking the meanderings of the river, I should think about fifteen miles.

SAML. A. BULLARD.

Subscribed and sworn to before me this 22 day of April, 1886.

[SEAL.] E. HAGEN,
Com. expires May 8th, 1888.

(Endorsed:) No. 611. U. S. vs. Bullard Cattle Co. and Samuel A. Bullard. Evidence of S. A. Bullard. Filed May 3, 1886. J. C. Wilson, clerk.

A true copy.
Attest:
[SEAL.] J. C. WILSON, *Clerk.*

17 STATE OF KANSAS, *County of Finney, ss:*

R. M. MORTON, of lawful age, being by me first duly sworn according to law, says on oath:

That he is an actual resident of Finney County, Kansas, and by occupation is a surveyor.

That he has been acquainted with the Arkansas River in Finney County, Kansas, for about seven years.

That the said Arkansas River can be crossed at most any point in Finney County, Kas., with a team and wagon.

That this said river in not an obstruction or barrier to the crossing and fording by cattle or by teams at any point in Finney County, Kansas, on said river. That affiant among his duties as surveyor has located tracts of land for actual settlers and no objection was ever made to locating settlers on Government land in the territory known as Bullard's pasture or Bullard's range, but that this said territory known as Bullard,s range or pasture was as free of access as any other portion of Government land in Finney County.

Affiant says further that he has located settlers in this said territory known as Bullard's pasture or range, and that S. A. Bullard, one of the parties interested in this said Bullard range or pasture, asked affiant to locate settlers therein, and that he (Bullard) would give him any pointers or assistance he could.

R. M. MORTON.

Subscribed and sworn to before me this 18th day of January, A. D. 1886.

[SEAL.] WILLIAM B. LAWRENCE,
Notary Public. Com. ex. Oct. 3, 1888.

(Endorsed:) No. 611, U. S. vs. Samuel A. Bullard et al. Affidavit. Filed May 3, 1886. J. C. Wilson, Clerk.

A true copy.
Attest:
[SEAL.] J. C. WILSON, *Clerk.*

18 STATE OF KANSAS, *County of Finney, ss:*

LEVI WILKINSON, of lawful age, being by me first duly sworn according to law, says on oath:

That he is now and has been for the last 6½ years an actual resident of Finney County, Kansas, and that during a part of this time a portion of Finney County was then called Sequoyah County; that for over six years he resided within one (1) mile of the Arkansas River, in Finney County, Kansas.

That he is familar and well acquainted with this said Arkansas River from Hutchinson to Coolidge, Kansas, and especially familiar with that portion of said river that lies north of the territory known as and commonly called Bullard's range or Bullard's pasture.

Affiant says that this river can be crossed and forded at any season of

the year and is no barrier or obstruction to the crossing and fording by range cattle. Affiant says that he with others owns a ranch on the north side of the Arkansas River, and that during the summer months they are greatly annoyed and troubled by the crossing of range cattle at this point.

Affiant says further that this said river has never overflowed since he has been familiar with said river, and is informed by old settlers that this said river was never known to overflow its banks.

LEVI WILKINSON.

Subscribed and sworn to before me this 18th day of January, A. D. 1886.
[SEAL.] WILLIAM B. LAWRENCE,
Notary Public. Com. ex. Oct. 3, *A. D.* 1888.

(Endorsed:) No. 611, U. S. vs. Samuel A. Bullard et al. Affidavit. Fled May 3, 1886. J. C. Wilson, clerk.

A true copy,
Attest,
[SEAL.] J. C. WILSON,
Clerk.

19 STATE OF KANSAS, *County of Finney, ss:*

W. R. HOPKINS, of lawful age, being by me first duly sworn according to law, says on oath:

That he is an actual resident of Finney County, Kansas; that he is an attorney at law, and is now and has been since October 1st, A. D. 1884, county attorney for Finney County, Kansas.

That he knows of the territory known as Bullard's range or Bullard's pasture, and that no complaints of any kind have ever been filed by him alleging that this territory was enclosed or that settlers were prevented from free access to their land situated within this said range or pasture.

Affiant says further that this subject has not ever been mentioned to him by any person or his attention been officially called to this subject by any inhabitant of Finney Co., Kas.

W. R. HOPKINS,
County Attorney.

Subscribed and sworn to before me this 18 day of January, A. D. 1886.
[SEAL.] WILLIAM B. LAWRENCE,
Notary Public. Com. ex. Oct. 3, 1888.

(Endorsed:) No. 611, U. S. vs. Samuel A. Bullard, et al. Affidavit of W. R. Hopkins. Filed May 3, 1886. J. C. Wilson, Clerk.

A true copy.
Attest:
[SEAL.] J. C. WILSON,
Clerk.

20 STATE OF KANSAS,
County of Finney, ss:

H. P. MYTON, of lawful age, being by me first duly sworn according to law, says on oath:

That he is an actual resident of Finney County, Kas.; that he has been

the register of the United States land office at Garden City, Kansas, from the 1″ day of Oct., A. D. 1883, up to the 8 day of January, A. D. 1886.

That he is acquainted with the territory known as Bullard's pasture or Bullard's range, and that the Government land located within this territory known as Bullard's range has been available and as free of access as any Government land in Finney County, Kansas.

Affiant is not aware of any opposition being made to actual settlers settling within this said territory.

H. P. MYTON.

Subscribed and sworn to before me this 18th day of January, A. D. 1886.

[SEAL.] WILLIAM B. LAWRENCE,
Notary Public. Com. Ex. Oct. 3, 1888.

(Endorsed:) No. 611. U. S. vs. Samuel A. Bullard et al. Affidavit. Filed May 3, 1886. J. C. Wilson, clerk.

A true copy.
Attest:
[SEAL.] J. C. WILSON,
Clerk.

21 STATE OF KANSAS, *County of Finney, ss:*

JOHN SIMON, of lawful age, being by me first duly sworn according to law, says on oath: That he is an actual resident of Finney County, Kansas, and has lived for the last five and a half (5½) years, about one (1) mile east of Garden City, Finney County, Kansas, and about one hundred (100) feet north of the north bank of the Arkansas River, that he is familiar and well acquainted with this said Arkansas River from Dodge City, Ford County, Kansas, to Maldo, in the State of Colorado, and especially familiar with said Arkansas River from Dodge City, Ford County, Kansas, westward to the Colorado State line.

That this said Arkansas River, west of Dodge City and in the State of Kansas, does not receive a single tributary and is fed only by the snow melting in the mountains of Colorado.

That this said river has never overflowed its banks and the average depth the year around of said river will not exceed eighteen (18) inches; that he fords this river at all seasons of the year; that the cattle of affiants have crossed twice every day this said river by fording for the last five (5) years.

That affiant has a pasture at this place, and just north of this said river; that all sides of this pasture are fenced except the south side; that affiant uses the north bank of this said river for or to take the place of a fence; that during the summer months affiant is greatly troubled by range cattle crossing this said river at this said point and getting into affiant's pasture; that this said bank of the river is no barrier, nor is the said river any barrier to prevent the crossing and recrossing of cattle.

Affiant says that this said Arkansas River, from Dodge City westward as aforesaid, is not a barrier or obstruction to the crossing and
22 recrossing of cattle, and that range cattle cross the said river at any of said points.

That the only means of crossing this said river west of Cimarron, Ford County, Kas., prior to March, 1885, was by fording.

That in May of the year 1885 a bridge was opened for the use of the public; that said bridge is located on the section line between sections nineteen (19) and twenty (20) in township 24 S. of range 32 W., in Finney County, Kansas.

That the south end of this said bridge opens into the territory known as Bullard's Range or Bullard's Pasture, and there are no obstructions of any kind or character between this said Bullard's Pasture or Range and this said bridge; and that three (3) traveled roads pass over and across this said Bullard Pasture or Range and connecting with this said bridge. Affiant says further that this said river can be crossed with loaded wagons at most any season of the year.

Affiant says further that his residence, located as aforesaid, is north of the territory known as Bullard's Pasture or Range.

JOHN SIMON.

Subscribed and sworn to before me this 18th day of January, A. D. 1886.

[SEAL.] WILLIAM B. LAWRENCE,
Notary Public, Com. Ex., Oct. 3, 1888.

(Endorsed:) No. 611. U. S. vs. Samuel A. Bullard et al., affidavit of John Simon. Filed May 3, 1886. J. C. Wilson, clerk.

A true copy.
Attest:
[SEAL.] J. C. WILSON,
Clerk.

23 UNITED STATES LAND OFFICE,
Gorden City, Kansas, Sept. 29th, 1885.

Hon. COM. GEN. LAND OFFICE, *Washington, D. C.:*

SIR: I make the following report of an examination made this day of an inclosure on the south side of the Arkansas River, in Finney County, Kansas. The inclosure commences near the N. W. corner of sec. 30, tp. 24 S., R. 32 W; thence south, on or near the township line, about 16 miles to about the S. W. corner of sec. 7, tp. 27 S., R. 32 W.; thence east, on or near the section line, about 12 miles to about the S. E. corner of sec. 12, tp. 27 S., R. 31 W.; thence north to the Arkansas River, in the neighborhood of the N. E. corner of sec. 25, tp. 25 S., R. 31 W. The north end fronting on the river is not fenced in, taking in altogether about 100,000 acres, of which about 42,000 acres R. R. land and the balance public land. Some few pieces of public land along the river front are held by settlers, and all the timber claims along the line of the sections on which the fence is located, are taken in strips about one-fourth mile wide and a mile long, and the parties holding the timber claims have agreed with the holder of the pasturage that if he will carry out the provisions of the land relative to timber culture on the lands held by them, he may place his fence on the timber claims and in this way make his fence perfect. The party holding the pasturage owns the R. R. or odd-numbered sections in the enclosure.

Along the river front the tillable land varies from about one-fourth of a mile to one mile in width, then comes the sand hills ranging in width

from four to six miles, and, in my opinion, unfit for anything but pasturage, and some of it very poor at that. The balance of the lands south of the sand hills I should judge to be good tillable land and with a fair amount of rain-fall would produce good crops.

24 The greatest drawback to its settlement at the present time is the difficulty of obtaining water, being found only at the depth of from 100 ft. to 150 ft. There are no settlers located inside the inclosure so far as I could ascertain except those located along the river front. Mr. Stephen A. Bullard is the person holding the inclosure, residence and P. O. address Dodge City, Kansas. I conversed with quite a number of persons, grangers, and others and the universal testimony was that Mr. Bullard did not attempt to interfere with any one settling inside the inclosure, but cheerfully gave them all the information and rendered them any assistance in his power relative to the lands and their rights as settlers thereon. Mr. Bullard has also put in gates at different points where requested so to do by those living outside the inclosure who had occasion to pass through it and has also bored several wells on his own land at different places, which are a great convenience to the traveling public passing through and the settlers who live in the vicinity of the wells.

Mr. Bullard's fence is made of posts and 3 strands of barbed wire. I gave Mr. Bullard a copy of the law of Congress passed last winter relating to unlawful inclosures of public lands. He answered me that as soon as complaint was made against him by settlers he would comply with the law and remove the fences.

Under the circumstances I would recommend that he be not disturbed until complaint is made and then I am satisfied he will put a stop to the complaints by taking the fence away from where it is unlawfully held by him. All of which is respectfully submitted for your consideration.

Very respectfully,

WM. S. DREW,
Special Agent, G. L. O.

(Endorsed:) No. 611. Exhibit A, 98788, Wm. S. Drew, special agent G. L. O., Garden City, Kansas, Sept. 29th, 1885. Report in re-

25 lation to inclosure of public lands in Finney County, Kas. By Stephen A. Bullard. 7934. Department of the Interior, L. & R. R. Div., received Nov. 24, 1885. Filed May 3, 1886. J. C. Wilson, clerk.

A true copy.
Attest:
[SEAL.] J. C. WILSON,
Clerk.

STATE OF KANSAS, *County of Finney, ss:*

R. ROUNDS, of lawful age, being by me first duly sworn according to law, says on oath:

That he is an actual resident of Finney County, Kansas.

That he is a member of the firm of Brown and Rounds, and that the business of said firm is to locate settlers on Government land and do all other business usually intrusted to land agents and land attorneys. That he is familiar with the territory known as Bullard's Pasture or Bullard's Range. That the Government land in this said pasture has been as free

of access to actual settlers as any Government land in Finney County, Kansas. That as far as affiant knows or has heard, no opposition of any kind has been made to locate settlers in this said territory or has any acts of intimidation or threats been made to keep actual settlers out of this said territory known as Bullard's Pasture or Range. Affiant says further that he understood, and has been informed, that S. A. Bullard had said and stated as follows, that if any actual settler wanted to settle on land in this said range or pasture that he (Bullard) would fence their crops and protect them from range cattle.

R. ROUNDS.

Subscribed and sworn to before me this 18 day of January, A. D. 1886.

WILLIAM B. LAWRENCE,
Notary Public, Com. Ex., Oct. 3, 1888.

26 STATE OF KANSAS, *County of Finney, ss:*

A. BENNETT, of lawful age, being by me first duly sworn according to law, says on oath:

That he is a member of the firm of Bennett & Smith, and that this said firm does a general land business; that a part of their business is to locate settlers on Government lands.

That their office and place of doing business is in the city of Garden City, Finney County, Kansas. Affiant says that he has heard read the above and foregoing affidavit of R. Rounds, and that he verily believes the same to be true and correct.

Affiant says, further, that the Government land in this said pasture or range is as free of access to actual settlers as any Government land in Finney County, Kansas, and that no opposition of any kind or character has ever been made to locating settlers within this said Bullard's range or pasture, and that S. A. Bullard requested affiant to locate settlers within this pasture or range, and that he, Bullard, would purchase their crops for his cattle.

A. BENNETT.

Subscribed and sworn to before me this 18th day of January, A. D. 1886.

[SEAL.] WILLIAM B. LAWRENCE,
Notary Public. Com. expires Oct. 3, 1888.

(Endorsed:) No. 611. U. S. vs. Samuel A. Bullard et al. Affidavit. Filed May 3, 1886. J. C. Wilson, Clerk.

A true copy.
Attest:
[SEAL.] J. C. WILSON, *Clerk.*

27 By the President of the United States of America.

A PROCLAMATION.

Whereas public policy demands that the public domain shall be reserved for the occupancy of actual settlers in good faith and that our people who seek homes upon such domain shall in nowise be prevented by any wrongful interference from the safe and free entry thereon to which they may be entitled;

And whereas, to secure and maintain this benificent policy a statute was

passed by the Congress of the United States on the twenty-fifth day of February in the year eighteen hundred and eighty-five which declared to be unlawful all inclosures of any public lands in any state or terrrtory to any of which land included within said enclosure the person, party, association, or corporation making or controlling such inclosure had no claim or color of title made or acquired in good faith or an asserted right thereto, by or under claim made in good faith with a view to entry thereof at the proper land office, and which statute also prohibited any person by force, threats, intimidation, or by any fencing or inclosure or other unlawful means from preventing or obstructing any person from peaceably entering upon or establishing a settlement or residence on any tract of public land, and subject to settlement or entry under the public land laws of the United States, and from preventing or obstructing free passage and transit over or through the public lands; and whereas it is by the fifth section of said act provided as follows:

"That the President is hereby authorized to take such means as shall be necessary to remove and destroy any unlawful inclosure of any of said lands and to employ civil or military force as may be necessary for that purpose; and whereas, it has been brought to my knowledge that
28 unlawful enclosures, and such as are prohibited by the terms of the aforesaid statute exist upon the public domain, and that actual legal settlement thereon is prevented and obstructed by such inclosures and by force, threats, and intimidation.

Now, therefore, I, Grover Cleveland, President of the United States, do hereby order and direct that any and every unlawful inclosure of the public lands maintained by any person, association, or corporation, be immediately removed, and I do hereby forbid any person, association, or corporation from preventing or obstructing by means of such inclosures or by force, threats, or intimidation, any person entitled thereto from peaceably entering upon and establishing a settlement or residence on any part of such public land which is subject to entry and settlement under the laws of the United States.

And I command and require each and every officer of the United States upon whom the duty is legally devolved, to cause this order to be obeyed and all the provisions of the act of Congress herein mentioned to be faithfully enforced.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this seventh day of August, one thousand eight hundred and eighty-five, and of the independence of the United States of America the one hundred and tenth.

[SEAL.] GROVER CLEVELAND.

By the President:

T. F. BAYARD,
Secretary of State.

(Endorsed:) No. 611. U. S. vs. Samuel A. Bullard et al. Proclamation. Filed May 3, 1886. J. C. Wilson, Clerk.

A true copy.
Attest:
[SEAL.] J. C. WILSON, *Clerk.*

29 EXHIBIT E.

U. S. district court, district of Kansas.

UNITED STATES
vs.
SAMUEL A. BULLARD, AND THE BULLARD Cattle Co.

The bill in this case is filed under the provisions of the act of Congress of Feb'y 25th, 1885, entitled "An act to prevent unlawful occupancy of the public lands" (U. S. Stat., vol. 23, 321), and seeks to enjoin the defendants from maintaining and to compel the removal of a fence inclosing a part of the public domain. The bill charges that the defendants have inclosed a large tract of land, about 100,000 acres, lying immediately south of and adjoining the Arkansas River in Finney County, and are using the same for a pasture or stock range.

The bill charges that the land is inclosed on the west, south, and east by a wire fence; that the fences on the east and west sides run up to the Arkansas River, which forms a barrier on the north.

The tract so inclosed is made up of lands of various classes of title and tenure. The odd-numbered sections were railroad lands which defendants had purchased and now own.

The even sections were public lands, including a few sections of school lands belonging to the State. Of the public lands some portions have been entered by parties under the homestead and timber culture acts, leaving something over 50,000 acres of public lands still unoccupied, a large portion of which are sandy and not desirable for agricultural purposes. The answer of the defendants avers and the proof shows that the fence on the east side of the tract had been removed by other parties who had built and owned it, so at this time the only artificial barriers are the south and west fences of defendants.

30 These lines of fences have been so built as to be entirely located on the lands of defendants and lands taken up by entries, as before stated, with the consent of the parties, with the exception of a mile or two which crosses the public lands. The Arkansas River is fordable at many places by stock and vehicles and at one place there is a public bridge. There are several public roads running across this range and gates provided by the defendants for persons and vehicles to pass through at will.

The defendants have placed no obstacles in the way of persons who have taken or who desire to take up any of the public land, but have the good will of all such persons so far as appears.

Under the facts shown I am of the opinion the defendants have not made an enclosure of the public lands as contemplated by the act of Feb'y 25th, 1885. We have to take the term enclosure as used in the act in its popular and usual sense and signification.

And two lines of fences running at right angles with each other do not constitute an enclosure, although there is a partial natural barrier on another side.

To some extent it may constitute a barrier or obstacle, but that does not constitute an enclosure, especially where there are roads and gates provided for public travel.

Office Supreme Court U. S.
FILED,
OCT 31 1890
JAMES H. McKENNEY
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
THE CENTRAL PACIFIC RAILROAD Company.
No. 48.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
THE CENTRAL PACIFIC RAILROAD Company. } No. 48.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decree of the circuit court for the district of California, dismissing a bill in equity filed by the United States to cancel three patents, signed by the President and countersigned by the Recorder of the Land Office, purporting to convey to the Central Pacific Railroad Company, in the aggregate, something more than 20,000 acres in the Sacramento Valley, Colusa County, Cal. The Central Pacific Railroad Company,

by a consolidation of two companies in 1870, became the successor in interest of the California and Oregon Railway Company. By the act of Congress July 26, 1866 (13 Stat. L., 239), the latter company received a grant of public lands consisting of the ten alternate sections designated by odd numbers on each side of each mile of said railroad, with the proviso that wherever such sections had been reserved, pre-empted, or sold, the company might select other sections in lieu of those thus lost, within a limit of 20 miles on each side of the road to be constructed, the selection to be made under the direction of the Secretary of the Interior.

Lying within the indemnity limits of this grant was a tract of land, 11 square leagues in extent, known as the Manuel Diaz grant claim. In 1852 Manuel Diaz petitioned the board of land commissioners appointed under the act of March 3, 1851 (9 Stat. L., 631), to confirm and reject land claims, to confirm his title to this tract of 11 square leagues under a Mexican grant. His petition was rejected. He appealed to the district court of California. His petition was there rejected, and on motion for rehearing was re-instated. The case was then transferred to the circuit court, where the claim was again rejected. An appeal was then taken to the Supreme Court of the United States, where the claim was finally rejected in March, 1873. The first of three patents, to cancel which this bill was filed, was for about 10,000 acres, and was issued March 5, 1872. The second patent was also for about 10,000 acres, and was issued March 17, 1875, and the third, for 40 acres, was dated December 20, of the same year.

ASSIGNMENT OF ERROR.

The circuit court erred in dismissing on the merits so much of the bill of the United States as sought to have the patent dated March 5, 1872, canceled.

ARGUMENT.

VALIDITY OF THE PATENTS OF MARCH 17, 1875, AND DECEMBER 20, 1875, CONCEDED.

It is conceded on behalf of the United States that the patents dated March 17, 1875, and December 20, 1875, were valid. They must be so under the decision of this court in *Ryan* vs. *The Central Pacific Railroad* (99 U. S., 383.) That case involved this very patent of March 17, 1875, and the question was of the effect of this Manuel Diaz grant claim upon the validity of the patent. No distinction can be made between the question presented on this record, and that decided in the Ryan case with reference to the patent of March 17, 1875, and it is not proposed to re-argue the questions there adjudged. The patent of December 20, 1875, must be similarly disposed of. It should be said in explanation of the filing of the bill, that it was prepared and filed after the decision in *Newhall* vs. *Sanger* (92 U. S., 761), and before the decision of the *Ryan case* (99 U. S., 382).

THE PATENT OF MARCH 5, 1872, WAS VOID.

The patent of March 5, 1872, was for 10,000 acres. A large part of this land was within the limits of the Manuel Diaz grant. Defendant conceded that about 6,000 acres were in the grant. It was decided by this court in

Newhall vs. *Sanger* (92 U. S., 761) that land in California, claimed under Mexican grants pending the proceeding to confirm the title and up to the time of the final rejection of the claim, was not public land within the meaning of that term as used in Congressional railroad grants, and was not the subject of patent to fulfill such grants. On March 2, 1872, the Manuel Diaz grant claim was pending on appeal in the Supreme Court. The lands embraced within its boundaries were, therefore, *sub judice*, and under the rule in *Newhall* vs. *Sanger*, *supra*, were not public lands or the subject of patent. It was beyond the power of the President or the Land Office Recorder, therefore, to convey the land by patent to any one. The act of these officers in issuing the patent was *ultra vires*, and the patent was absolutely void. It follows that the patent conveyed no title to the railroad company whatever.

In *Smelting Company* vs. *Kemp* (104 U. S., 636), Mr. Justice Field reviewed the cases in this court involving the validity of Government patents for public lands and pointed out with great clearness the distinction between the effect of patents issued by the Land Department for lands over which it had jurisdiction, and of those for lands over which it had not. On page 641 the learned justice said:

> Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had

> previously been disposed of, *or if Congress had made no provision for their sale*, or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed.

By the holding in *Newhall* vs. *Sanger, ubi supra*, the land within the Manuel Diaz grant was not public land for sale. The Land Department had no jurisdiction over it, therefore, and a patent for it was without authority and void. Nor is this conclusion affected by the qualification of the general doctrine stated by Mr. Justice Field:

> That when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the Land Department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision. (104 U. S., 645.)

In the case at bar the Land Department knew that the patent was for land within the Manuel Diaz claim, but it supposed that the land was subject to the grant to the railroad company after the rejection of the claim by the circuit court and before appeal to the Supreme Court. On page 90 of the record will be found a letter from the Commissioner of the General Land Office, dated February 12, 1870, and on page 91 of record the answer to that letter by the surveyor-general of California, dated February 25, 1870. From these letters it sufficiently appears that

the Land Office knew of the pendency of the Manuel Diaz suit, and also that the opportunity for appeal did not expire until July 1, 1872. It appears also from the letter of Upson, surveyor-general of California, July 9, 1866, pages 88 and 89 of the record, that the Diaz grant had been surveyed by the officers of the Land Department.

The lands included in the patent of March 3, 1872, are all embraced in T. 17 N., R. 2 W., of the Mount Diablo meridian, and in T. 17 N., R. 3 W., D. M. (see patent, Rec., pp. 72 and 73). T. 17 N., R. 2 W., was recognized as being in the Diaz grant by the surveyor-general because it was suspended from settlement on that account (see letter of Surveyor-General Day, December 10, 1868, Rec., p. 90). So, too, T. 17 N., R. 3 W., was similarly recognized to be within the Diaz grant (see letter of Wilson, Commissioner, February 12, 1870, Rec., pp. 90 and 91). It thus appears that it was known by the Land Department that the Diaz claim embraced the lands included in the patent of March 3, 1872, and that the time for appeal to the Supreme Court had not expired when the patent was issued. As a matter of fact the appeal had been taken January 28, 1871 (see letter of Hardenburg, surveyor-general, January 6, 1873, Rec., pp. 96 and 97). The certificate by the Register of the Land Office (Record, page 63) was that the lands included in the patent "are not nor is there any part thereof returned and denominated as mineral lands or land, nor claimed as swamp land; neither are there any homesteads, pre-emptions, State, *nor other valid* claim to any portion of said lands on file or record in this office." There was, however, the Manuel

Diaz claim on file as appears from the foregoing. That it was not valid was immaterial. It had not then been finally rejected. It is clear from the foregoing that the Land Department, in issuing the patent for lands dated March 3, 1872, acted with full knowledge and through no mistake of fact, and that its mistake was in supposing it had jurisdiction to deal in any way with land in the Diaz grant until it was finally rejected with no opportunity for appeal. No finding of fact by the Land Department is impeached, therefore, in the contention that it was without jurisdiction to patent the land on March 3, 1872, but only its views of its own jurisdiction under the law. The patent was then for land withheld by law from sale or grant, and was therefore void.

AS THE PATENT WAS VOID, IT CONVEYED NO TITLE AT ALL TO THE COMPANY, BUT WAS MERELY A CLOUD UPON THE TITLE OF THE UNITED STATES, WHICH IT MIGHT PROPERLY ASK A COURT OF EQUITY TO CANCEL.

If the patent was void it conveyed no title, and the United States might have maintained ejectment against the occupiers of the lands. The patent was in the form of law, however, and signed by officers ordinarily charged with the duty of executing lawful patents. It was made the basis of a claim of title by the company and its grantees. The United States was, therefore, entitled to have the patent delivered up and canceled by bill in equity. (Story's Equity Jur., Vol. II, sec. 699, 700.)

Judge Sawyer, in disposing of this case below, conceded that the patent of March 3, 1872, was illegal (Opinion, see Record, p. 31); but he considered that it was voidable, not void, and capable, therefore, of passing title. He

then concluded that he ought not to avoid the patent, because in doing so he would be doing a vain thing. He said that the railroad company would be entitled, if this patent were set aside, to again select the same lands in lieu of the "place" sections, and its defense to the bill indicated that it would do so. To set aside this patent, therefore, was only to put the company in a position where it could and would demand a new one for the same land. This was doing a vain thing. The action of Judge Sawyer in refusing to set aside the patent confessedly illegal was in effect a confirmation of a voidable patent to the company. But such action could, of course, not be had with reference to a void patent. Even if the company were entitled to a patent for these lands, a court of equity could not give life to a void patent and make it serve the purpose of one executed by lawfully authorized agents any more than it could confer vitality on a forgery.

EVEN IF THE PATENT WERE ONLY VOIDABLE THE UNITED STATES WAS ENTITLED TO HAVE IT SET ASIDE, BECAUSE IT DOES NOT FOLLOW THAT THESE LANDS MUST BE RE-PATENTED TO THE RAILROAD COMPANY WHEN IT SELECTS THEM.

Judge Sawyer's conclusion rests on the assumption that immediately upon the setting aside of the illegal patent, the company might select the same lands and demand from the Government as of right a new patent therefor. Issue is respectfully taken with this assumption of the learned judge. In the event of the setting aside of the patent, the right of the company would be to select lands of equal quantity to make up the deficiency in "place" sections which the lands described in the patent were originally

selected to supply. Such selection does not, however, pass the title or give a right to a patent until the Secretary of the Interior approves the selection. By the terms of the grant the selection is to be made under the direction of the Secretary of the Interior. The approval of the Secretary thus required is not a mere ministerial duty, formal in its character, but it is in its nature the exercise of judicial discretion not subject to control by the courts. In *Wisconsin Railroad Company* vs. *Price* (133 U. S., 496), this court decided that—

> The act of the Secretary of the Interior in approving the selection of indemnity lands by a railroad land-grant company, to supply deficiencies in selections within the place limits, is judicial, and until it is done the company has no equitable right in the selected tracts; and this rule is not affected by the fact that such a refusal was given under a mistake of law, and was subsequently withdrawn and an assent given.

No court can presume that the approval of the Secretary will necessarily follow the selection of the Railroad Company. The United States has the right to the exercise of the Secretary's judicial discretion thus secured to it by law, and this right, it is respectfully submitted, Judge Sawyer wholly ignored in ruling as he did upon this question. It may very well happen that the surrounding circumstances will lead the Secretary to withhold his approval from the selection of these lands. A court of equity could certainly not prevent or control this.

How, then, can the court of equity take that for granted as done which it could not legally or rightfully compel to be done?

The approval by the Secretary of the Interior of the original selection can not help the railroad company, because all the acts of Government officers with reference to that were without authority and void.

AS TO DEFECT OF PARTIES.

A careful examination and comparison of the surveys, patent, and deeds of conveyance made by the railroad company compels an admission that nearly all of the lands described in the patent which were included within the Manuel Diaz grant were conveyed absolutely by the railroad company to others before the filing of the bill herein. It ought to be noted, however, that the purchaser of some 6,000 acres, eleven-twelfths of all the lands really involved, E. H. Miller, jr., was the secretary of the company who joined in executing the deed to himself, and who signs the answer of the company in this case. (Record, p. 22, 145, 146, 147.) There could be no difficulty in making him him a party therefore, and he certainly could occupy no better position than the company. And even if everything claimed by the railroad is conceded, the record will show the title to from 40 to 500 acres to be in the company. This is covered by a mortgage but the equity of redemption is in the railroad company. Judge Sawyer did not find that all the land covered by the Diaz grant had been sold, but that it had been all covered by a mortgage. (See Opinion Rec., p. 32, 33.) This is an action to cancel the patent as a void instrument, and as that still remains in the possession of the company, the company is a necessary party. The fact that the purchasers were

not made parties may have been a reason for Judge Sawyer to dismiss the bill without prejudice. Instead of doing so he entered a decree of dismissal on the merits. This appears from his opinion which could always be used to show that the dismissal was not without prejudice. He thus forever barred an action to cancel the patent into which all the persons interested might be brought.

The dismissal should have been without prejudice. *House* vs. *Mullen* (22 Wall., 42); *Hunt* vs. *Wickliffe* (2 Peters, 215); *Huston* vs. *McClarty* (3 Litt., 274); *Royce* vs. *Tarrant* (6 J. J. Marsh, 567); *Caldwell* vs. *Hawkins* (1 Litt., 212); *Hackwith* vs. *Damron* (1 Monroe, 239); *Van Epps* vs. *Van Deusen* (4 Paige, 64); *Payne* vs. *Richardson* (7 J. J. Marsh, 240); *Harris* vs. *Carter* (3 Stewart, Ala., 233); 1 Daniell's Chancery Practice, 287, note 2. On the merits the United States is entitled to a reversal for the reasons given above. It is submitted, therefore, that the decree should be reversed and the case sent back with directions to have the purchasers made parties, and on failure of the complainant to bring them in, the bill to stand dismissed without prejudice.

WM. H. TAFT,
Solicitor-General.

O